No. 21A539

In the Supreme Court Of The United States

STATE OF LOUISIANA; STATE OF ARKANSAS; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF WEST VIRGINIA; STATE OF WYOMING; STATE OF TEXAS; AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AND NATIONAL HYDROPOWER ASSOCIATION,

APPLICANTS,

V.

AMERICAN RIVERS; MICHAEL S. REGAN; AND U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

RESPONDENTS.

ON APPLICATION FOR STAY, OR, IN THE ALTERNATIVE, ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO APPLICATION FOR STAY PENDING APPEAL

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

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PARTIES

The parties to the proceedings below are as follows:

Applicants American Petroleum Institute, Interstate National Gas Association of America, and National Hydropower Association were intervenor defendants in the district court and are appellants in the court of appeals.

Applicants State of Arkansas, State of Louisiana, State of Mississippi, State of Missouri, State of Montana, State of West Virginia, State of Wyoming, and State of Texas were intervenor defendants in the district court and are appellants in the court of appeals.

Plaintiffs-Respondents are American Rivers, American Whitewater, California Trout, Idaho Rivers United, Columbia Riverkeeper, Sierra Club, Suquamish Tribe, Pyramid Lake Paiute Tribe, Orutsararmiut Native Council, State of California, State Water Resources Control Board, State of Colorado, State of Connecticut, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of Michigan, State of Minnesota, State of Nevada, State of New Jersey, State of New Mexico, State of New York, State of North Carolina, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, State of Wisconsin, and District of Columbia. Respondents were plaintiffs in the consolidated cases before the district court and are appellees in the court of appeals.

Defendant-Respondents are the United States Environmental Protection Agency and Michael S. Regan, Administrator.

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INTRODUCTION

Over five months ago, the district court in this case vacated and remanded to the Environmental Protection Agency (EPA) a 2020 rule that radically changed the standards governing Clean Water Act Section 401 certifications (2020 Rule). Applicants waited a month to appeal and seek a stay from the district court, and then, after the court of appeals denied their next request for a stay, they waited an additional month before seeking a stay from this Court. Applicants' repeated delays confirm what is obvious from their brief: they are suffering no irreparable harm from the vacatur. Indeed, despite the many months that have passed, Applicants fail to identify a single concrete harm that they have suffered or will suffer, much less an irreparable one. That failure is fatal to their application for emergency relief here. It is also unsurprising, as the district court's vacatur merely restored regulations that EPA, states, and tribes had successfully implemented, and that regulated entities were subject to, for fifty years.

Applicants also fail to meet the other requirements for the extraordinary remedy of a stay from this Court, as they cannot show a likelihood that certiorari will be granted and that the judgment below will be reversed. The district court's decision to remand the 2020 Rule to EPA at its request, and also vacate it during the agency's reconsideration, follows a path many courts have taken both before and after Congress enacted the Administrative Procedure Act (APA), 5 U.S.C. §§ 500, *et seq*. When an agency adopts a rule and parties harmed by that rule (as the undersigned Plaintiffs-Respondents were here) challenge it in court, agencies sometimes ask the

court to remand the rule to the agency, rather than ruling on the merits, so the agency can reevaluate the rule and revise it to address the harms raised. Applicants do not dispute that courts have the equitable power to remand in such circumstances, even though no such procedure is mentioned in the APA. Indeed, unlike Plaintiffs-Respondents, who opposed remand and pressed for a ruling on the merits, Applicants did not contest EPA's request here. In exercising this equitable remand power that long predates the APA, courts have always had the accompanying equitable power to vacate the rule. The APA did not disturb that power. There is no circuit split on this issue, leaving Applicants both wrong on the merits and empty-handed on the justification for certiorari.

In sum, there is no basis here for the extraordinary remedy of a stay, much less for a grant of certiorari before judgment and summary reversal. The Court should deny Applicants' request.

STATEMENT

A. Clean Water Act Section 401

Section 401 of the Clean Water Act, 33 U.S.C. § 1341, empowers states and authorized tribes to review and certify projects affecting waters within their borders before federal permits for those projects may issue. Under Section 401, "[a]ny applicant for a Federal license or permit to conduct any activity, including but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters," must obtain a certification from the relevant state or tribe that the discharge will comply with applicable water quality standards.

33 U.S.C. § 1341(a). That certification must also contain any "limitations" and "monitoring requirements" necessary to assure that the "applicant" will comply with water quality standards and "any other appropriate requirement of [s]tate law." *Id.* § 1341(d).

Section 401 is "essential" to Congress' "scheme to preserve state authority to address the broad range of pollution" affecting their waters. *S.D. Warren Co. v. Maine Bd. of Env't. Prot.*, 547 U.S. 370, 386 (2006). Pursuant to this authority, when a state or authorized tribe receives a request for certification, it may grant the certification, grant certification with conditions, waive certification, or deny certification. If a state or tribe grants a certification with conditions, those requirements are incorporated into the federal license or permit issued to the project applicant. 33 U.S.C. § 1341(d). If a state or tribe denies certification, "no license or permit shall be granted." *Id.* § 1341(a)(1).

In *PUD No. 1 of Jefferson County v. Washington Department of Ecology* (*PUD No. 1*), this Court held that the text of the Clean Water Act, consistent with EPA's 1971 regulations, authorizes states and tribes to place "additional conditions and limitations on the activity as a whole," rather than just the discharge itself. 511 U.S. 700, 711 (1994). This Court concluded that while "Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges[,]" Section 401(d) "is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *Id.* at 711-712. "The language of [Section 401(d)] contradicts

petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge.'" *Id.* at 711.

If project applicants are dissatisfied with a certification decision, they may seek review before state courts or administrative tribunals, and under some circumstances in federal court. For example, the proponents of one of the projects discussed by Applicants—the proposed Millennium Bulk Terminal coal export facility (Millennium)—sought, albeit without success, review before Washington's environmental appeals board and in federal court (on issues unrelated to the scope of Section 401). *Lighthouse Res. Inc. v. Inslee*, No. 3:18-cv-05005, 2018 WL 6505372, at *2 (W.D. Wash. Dec. 11, 2018), *appeal dismissed*, No. 19-35415 (9th Cir. Mar. 23, 2021). Likewise, in reviewing North Carolina's denial of certification for the Mountain Valley Pipeline Southgate project, the Fourth Circuit found the decision was "consistent with its water standards, [and therefore] consistent with the Clean Water Act" but separately vacated and remanded for further explanation. *Mountain Valley Pipeline, LLC v. N.C. Dep't of Env't Quality*, 990 F.3d 818, 829 (4th Cir. 2021). And New York's denial of certification for the Constitution Pipeline was upheld when challenged because the applicant "persistently refused" to provide information necessary to assess the project's water-quality impacts. *Constitution Pipeline Co. v. N.Y. State Dep't of Env't Conservation*, 868 F.3d 87, 103 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1697 (2018).

For fifty years, states and tribes have exercised their Section 401 authority effectively and as Congress envisioned. During the rulemaking at issue here, EPA

cited favorably to a 2019 survey of certifying states finding that "states work hard to issue [S]ection 401 certifications in a timely manner and very rarely issue denials of certification." Resp. App. 237a. The survey noted that "the average length of time for states to issue a certification decision once they receive a complete request is 132 days," with incomplete submissions by applicants as the most common reason for delay. Resp. App. 210a; *see also* Stay App. 412 (New York issues more than 4,000 certifications each year, the "vast majority" of which are "granted within 60 days").

The rare certification denials that states and tribes have issued hew closely to water quality concerns. For example, contrary to Applicants' distorted narrative, *see* Application 6-7, when Washington denied certification for the Millennium project, it did so expressly because "the State did not have reasonable assurance that the proposed terminal would meet applicable water quality standards," given the applicants' failure to submit wetlands mitigation plans and adequately demonstrate that storm and wastewater impacts would be controlled. *Lighthouse Res. Inc.*, 2018 WL 6505372, at *4. Similarly, North Carolina denied certification for the Mountain Valley Pipeline Southgate extension "for the express aim of preventing needless harm to the State's rivers, streams, and wetlands." *Mountain Valley Pipeline*, 990 F.3d at 831. And New York denied certification for the Constitution Pipeline based "principally on Constitution's failure to provide information with respect to stream crossings." *Constitution Pipeline Co.*, 868 F.3d at 96.

B. The 2020 Rule

In 2020, directed by executive order, EPA substantially revised its regulations governing Section 401 certifications. *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210 (July 13, 2020) (the 2020 Rule); *see also* Exec. Order 13,868, 84 Fed. Reg. 15,495 (Apr. 10, 2019).

The linchpin of that effort was to dramatically reduce state and tribal authority under Section 401. The 2020 Rule restricted states and tribes to ensuring only "that a discharge from a Federally licensed or permitted activity will comply with water quality requirements," 40 C.F.R. § 121.3, rather than considering impacts from and placing conditions on the "activity as a whole" as this Court understood the Act to authorize in *PUD No. 1*, 511 U.S. at 711. That newly restricted scope of certification in turn limited the information that project proponents needed to submit to trigger the decision clock for a certification, 40 C.F.R. § 121.5(b)(4), (5) (information related to project's discharge), the "reasonable period of time" for decisionmaking, *id.* § 121.6(c), the grounds on which certification could be denied, *id.* § 121.7(e), and the circumstances in which certification conditions could be incorporated into a federal permit, *id.* §§ 121.7(d), 121.10.

The 2020 Rule caused disarray nationwide in implementing Section 401, harming states, tribes, and project proponents. As the State of Texas' Commission on Environmental Quality has noted, the 2020 Rule "caused considerable implementation confusion" and "brought about the breakdown of a long-standing, formally established and cooperative process" between Texas and the Army Corps of

Engineers.[1] Permitting ground to a halt, causing widespread disruptions. For example, in Washington State, the 2020 Rule fomented the near collapse of the aquaculture industry when growers could not get permits processed in time for the planting season. Stay App. 325-327.

Three sets of plaintiffs, including 20 states and the District of Columbia, three tribes, and six conservation organizations (here, Plaintiffs-Respondents), filed separate suits in the Northern District of California challenging the 2020 Rule. Eight states and three industry trade groups representing hydropower and fossil fuel interests intervened in the lawsuits to defend the 2020 Rule.

After President Biden took office, EPA announced its "intention to reconsider and revise" the 2020 Rule. Notice of Intention To Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 Fed. Reg. 29,541 (June 2, 2021). EPA moved in the district court for a voluntary remand, Stay App. 226-243, noting that it intended "to reconsider and revise the [2020 Rule] to restore the balance of state, [t]ribal, and federal authorities consistent with the cooperative federalism principles central to [Clean Water Act] section 401." Resp. App. 96a. EPA did not identify specific revisions it intended to make. EPA stated that it intended to propose a revised rule in spring of 2022 and issue a final rule after notice and comment in spring of 2023. Resp. App. 98a-99a. EPA specifically sought remand "with prejudice" but

[1] https://www.regulations.gov/comment/EPA-HQ-OW-2021-0302-0079 (last visited on Mar. 24, 2022).

"without vacatur," Resp. App. 101a, which would have left the 2020 Rule in effect pending EPA's reconsideration.

Plaintiffs-Respondents opposed the request, arguing that the Court should deny remand and order merits briefing. Stay App. 244-266; 267-423; 424-449. Plaintiffs-Respondents submitted declarations from eight states and a tribe describing the specific, concrete harms that would befall them if the 2020 Rule were left in place, even if only until 2023. Stay App. 299-423; Resp. App. 67a-74a. In the alternative, Plaintiffs-Respondents contended that if the Court granted remand, it should do so *with* vacatur, under the two-factor test from *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146 (D.C. Cir. 1993), because of the 2020 Rule's pervasive and irredeemable flaws and because of the disruption that would result from leaving it in place. Stay App. 259-264; 287-292; 431-447. Although Applicants failed to respond to EPA's motion for remand without vacatur, Stay App. 226-243, they requested and received leave to file a brief in response to Plaintiffs-Respondents' oppositions to the extent they sought remand *with* vacatur. Stay App. 478-496.

On October 21, 2021, the district court granted EPA's motion for remand and determined the 2020 Rule should be vacated. Stay App. 552-569 (remand order). The court observed that the APA does not preclude equitable relief. Stay App. 558-559. Applying the *Allied-Signal* analysis, and considering the parties' briefing, the district court determined vacatur was appropriate. Stay App. 563-568. Following the court's decision, certifying authorities have returned to the familiar pre-2020 procedures. Resp. App. 153a.

After waiting a full month, Applicants appealed and moved to stay the remand order. Stay App. 571-611. EPA did not appeal and opposed the stay on the grounds that the remand order was not subject to appeal by Applicants. Resp. App. 1a-11a. The district court denied the stay on December 7, 2021. Stay App. 612-625 (stay order). On December 15, 2021, Applicants moved for a stay pending appeal from the court of appeals. The court denied the motion on February 24, 2022. Stay App. 799-802. It found that Applicants failed to demonstrate "a sufficient likelihood of irreparable harm to warrant the requested relief." Stay App. 802.

Four weeks after the court of appeals denied their motion for a stay pending appeal, Applicants again seek a stay pending appeal or, in the alternative, certiorari before judgment and summary reversal in this Court. Opening briefs in the appeal of the underlying decision are due April 6, 2022. The 2020 Rule has already been vacated for over five months.

ARGUMENT

The relief Applicants seek is extraordinary. In considering an application to stay matters pending before the court of appeals, this Court must find "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Such applications are "rarely granted." *Atiyeh v. Capps*, 449 U.S. 1312, 1313 (1981) (Rehnquist, J., in chambers).

Because Applicants fail to meet their heavy burden to establish all of the stay factors, their request should be denied. Applicants fail to establish any issue on which this Court is likely to grant review. There is no split among the circuits on whether courts may vacate rules when an agency seeks voluntary remand. Indeed, no circuit has squarely weighed in, suggesting the issue is neither problematic nor frequently occurring. Moreover, this case is a poor vehicle to address the underlying issue because serious jurisdictional questions remain pending below that may prevent the Ninth Circuit or this Court from reaching the merits.

Further, the district court appropriately exercised its established authority to minimize disruption when EPA sought to withdraw from judicial review the 2020 Rule after admitting it was flawed and legally dubious. When a court exercises its equitable authority to grant an agency's request for voluntary remand (a procedure not mentioned in the APA), the court has inherent power to vacate or retain that rule on remand, and balancing the harms that may result from doing one or the other is a commonplace and necessary role for courts reviewing agency actions.

With no court of appeals precedent on point, let alone a conflict among the circuits, there is no basis to grant certiorari at all, much less certiorari before judgment and summary reversal.

But the Court need not even consider the merits of the question or its suitability for certiorari because the total lack of harm forecloses relief here. Applicants fail to show any concrete harms flowing from vacatur of the 2020 Rule, let alone irreparable ones. The loss of a regulation they preferred, which was in effect

just over a year, and the restoration of a regulation that governed Section 401 certifications for decades before that, is not a harm sufficient to warrant the extraordinary relief they seek.

A. There Is No Reasonable Probability that the Court Will Grant Certiorari and Reverse

1. Applicants do not even attempt to satisfy this Court's traditional criteria for certiorari. First, they fail to identify a circuit split because there is none. Instead, multiple district courts in multiple circuits agree that, on an agency's motion for voluntary remand, the district court may consider whether that remand should be with or without vacatur. Resp. App. 120a-121a (collecting cases). Applicants have not shown that any circuit court has held to the contrary. Indeed, none has even been called upon to address this issue. It would be particularly premature for the Court to weigh in now, before the Ninth Circuit has had a chance to rule.

This case provides a poor vehicle to address the issue for another reason. Serious questions remain below regarding Applicants' ability to pursue the underlying appeal. Both EPA and the tribal and conservation group Plaintiffs-Respondents filed motions to dismiss the appeal based on significant questions of finality and standing. Stay App. 783. While the court of appeals declined to grant those motions when it denied Applicants' motion for stay, the court did so without prejudice and with an invitation for the parties to address those issues as the case proceeds to merits briefing. Stay App. 802; Resp. App. 155a-185a.

That briefing is imminent, with opening briefs below due in a matter of days and merits briefing set to be completed in less than two months. Stay App. 802. The

Ninth Circuit should be permitted to address these jurisdictional questions, and, if appropriate, the merits of the district court's remand order in the first instance.

2. Nor have Applicants demonstrated a fair probability that this Court will reverse the judgment below. Out of respect for the executive branch, courts have developed a permissive framework under which an agency's request for remand is ordinarily granted, even when the agency does not confess error, so long as the request is not "frivolous or in bad faith." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *see also California Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (adopting *SKF* framework for remand). By granting remand—even when an agency has not committed to a specific course of action or a prompt timeline—a court is foregoing the ordinary course of judicial review, leaving litigants without recourse until the agency acts, which may or may not address their concern.

Under this narrow circumstance, a corresponding authority to vacate rules is necessary to do "complete rather than truncated justice." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). A court must have the power to vacate a rule when granting an agency's request for remand because otherwise the rule's challengers are left subject to a rule they claim is invalid. *Cf. Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1288 (D.C. Cir. 2000) (denying motion for voluntary remand without vacatur for this reason). Indeed, concern for this legal limbo led Plaintiffs-Respondents to oppose EPA's motion for remand, and suggest remand with vacatur only in the alternative. Stay App. 271-272.

The district court's understanding and exercise of its authority adhered to this Court's and other courts' traditional understanding of equitable authority over administrative actions. This Court has held that a federal court reviewing agency actions possesses the equitable authority to "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co. v. Nat'l Lab. Rel. Bd.*, 305 U.S. 364, 373 (1939); *see also United States v. Morgan*, 307 U.S. 183, 191 (1939) (a court reviewing agency action "sits as a court of equity" and may shape relief "in conformity to equitable principles"). Within that authority, it has consistently been "familiar appellate practice"—extended to administrative matters—"to remand causes for further proceedings without deciding the merits, where justice demands that course," including "set[ting] aside the decree" in the process. *Ford Motor Co.*, 305 U.S. at 373 (likening judicial review to appellate review of lower court decisions). Courts have likewise long recognized the "'inherent' authority" of a reviewing court "to condition [a] remand order as it deems appropriate." *Tyler v. Fitzsimmons*, 990 F.2d 28, 32 n.3 (1st Cir. 1993) (citing *Melkonyan v. Sullivan*, 501 U.S. 89, 101-102 (1991)).

In arguing that the APA displaced this judicial authority, Stay Appl. 17-20, Applicants use the wrong frame of reference. Chapter 7 of the APA addresses when judicial review of an agency action is appropriate, as well as what courts can and cannot do within that review. 5 U.S.C. §§ 701-706. A court considering an agency's request for remand, however, is not engaging in judicial review of the challenged rule. Remand, in fact, avoids judicial review. Discretion to grant remand requests with or

without vacatur allows a court to balance the agency's desire to avoid judicial review and continued litigation against the disruption that may result from leaving the challenged action in place.

The APA does not preclude this result. Congress' intent to foreclose equitable remedies "must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter*, 328 U.S. at 398. In fact, the APA evinces an opposite intent—to *preserve* rather than restrict the equitable powers of the courts. *See* Legislative History of the Administrative Procedure Act, Sen. Doc. No. 158, 79th Cong. 2d Sess., at 39 (1944-46) (noting that judicial review provision of APA should not be construed as "limiting or unduly expanding judicial review"); Attorney General's Manual on the Administrative Procedure Act, at 93 (1947) (APA judicial review provision intended as "a general restatement of the principles of judicial review embodied in many statutes and judicial decisions.").

Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978), does not counsel otherwise or control. *Vermont Yankee* addressed whether courts, in exercising judicial review under the APA, can force agencies to engage in procedures not required by the APA. It said nothing about the scope of a court's authority when an agency asks for remand to *avoid* judicial review. *Id.* at 524-525. And, contrary to the dicta cited by Applicants, Stay Appl. 17 (citing *Vt. Yankee*, 435 U.S. at 558), the district court here exercised reasoned discretion, considering both

the legal flaws of the 2020 Rule and the harm and disruption that would result from leaving it in place while EPA reconsidered it.

The APA's sovereign immunity waiver provision is no more helpful to Applicants than its judicial review provision. *See* Stay Appl. 23-24. For one, the defense of sovereign immunity is for the federal government to raise, not Applicants, and it has not been raised by EPA here. Moreover, neither EPA nor Applicants disputes that EPA was properly subject to Plaintiffs-Respondents' suits. The question is what actions the district court could take when it granted—out of comity and prudence, not a claim of immunity—EPA's request to remand the 2020 Rule without resolving the litigation. Applicants' reliance on Congress' preservation of "other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief," 5 U.S.C. § 702(1), gets them nowhere. Applicants wrongly assume a "limitation" precluded the actions the district court took here, when in fact and as laid out above, no such limitation existed before the APA and no such limitation exists now.

Section 706(2)(A) of the APA provides that a court "shall" set aside unlawful agency actions. 5 U.S.C. § 706(2)(A); *see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall'. . . normally creates an obligation impervious to judicial discretion"). But if Applicants were right that a court's vacatur power begins and ends with that provision, *see* Stay Appl. 18, then vacatur of an unlawful rule would always be mandatory. Yet many courts have held that, while "[t]he ordinary practice is to vacate unlawful agency action," courts retain

equitable discretion to "not vacate the action but instead remand for the agency to correct its errors." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019); *see also, e.g.*, *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532-533 (9th Cir. 2015) (discussing equitable considerations requiring remand *with* vacatur); *California Cmtys. Against Toxics*, 688 F.3d at 992 (discussing equitable considerations requiring remand *without* vacatur). This practice underscores that the discretion to vacate or retain administrative actions under such circumstances rests in the sound equitable discretion of the court.

3. The district court reasonably exercised its authority to grant voluntary remand with vacatur. Although the district court did not have summary judgment briefing before it, the parties did address the substance of the 2020 Rule with legal and evidentiary support; indeed, the district court allowed Applicants supplemental briefing to more fully air their views. Stay App. 259-261, 373-278, 433-439. The district court recognized that the linchpin of the 2020 Rule—restricting states and tribes to considering only water quality impacts from discharges rather than from the activity as a whole—both contradicted this Court's holding in *PUD No. 1* and undermined central provisions of the Clean Water Act. Stay App. 563-564. While the district court did not squarely hold that the 2020 Rule was contrary to law, the court's (correct) analysis of its manifest flaws informed its decision to remand to the agency with vacatur.

Additionally, and in contrast to the speculative and ill-defined harms claimed by Applicants, the district court had before it a record showing specific examples of

disruption and harm to Plaintiffs-Respondents from the 2020 Rule—harms that have never been controverted by Applicants. Plaintiffs-Respondents extensively described the challenges states and tribes faced in attempting to implement the 2020 Rule. They also identified specific license and permit applications that would be subject to the 2020 Rule's constriction of state and tribal authority, including some hydropower licenses in Washington State and elsewhere that would potentially have deficient water quality conditions locked in for decades to come if the 2020 Rule now applied. Stay App. 316, 323-324.

Finally, Applicants' claims of potential for agency abuse are unconvincing. Applicants overlook the significant protections within the established framework for evaluating agency requests for remand, which, as noted, looks at whether the request is "frivolous or in bad faith." *SKF USA Inc.*, 254 F.3d at 1029. And any decision as to vacatur would be made pursuant to the two-part *Allied-Signal* test, requiring the reviewing court to consider both the magnitude of the agency's apparent error and any prejudice that would result from vacatur. Applicants' claims of potential for abuse wrongly presume that the judiciary will either participate in, or turn a blind eye to, agency attempts to conduct surreptitious rule repeals on motions for voluntary remand. Those claims also ignore the countervailing risk that, if vacatur is not available, agencies may withdraw dubious actions from judicial review, without the accountability of confessing error, and leave parties challenging that action without any interim remedy.

4. For these same reasons and more, the Court should decline to grant Applicants' extreme and unsupported alternative request for certiorari before judgment and summary reversal. Indeed, as set out below, Applicants cannot even show how *they* are harmed by returning to the familiar pre-2020 Section 401 system for the next several months, much less establish that this case "is of such imperative importance" generally that the Court should ignore its careful process for reviewing lower court decisions by granting certiorari before judgment. Moreover, Applicants' reliance on a comparison of the appellate and rulemaking timelines turns the criteria for certiorari on its head. That the impacts of vacating the 2020 Rule may be short-lived is a reason for this Court to *deny* review, not grant it—especially when Applicants have not pointed to any impacts harming them.

Applicants' request for summary reversal is especially extreme. "Summary reversals of courts of appeals are unusual under any circumstances." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990). That demanding standard is not met here.

As set out in detail above, there is no "settled and stable" law rejecting the district court's approach. Indeed, neither this Court nor any circuit has ever held that approach improper. On the contrary, a court's equitable authority within the context of an agency's request for voluntary remand is well-founded. *See supra*, at 12-16. The remand order at issue here was not in error, much less "clearly so." But even if there were some question as to whether the remand order was properly decided, summary reversal would still be unwarranted. There is no case or other authority directly on

point establishing the impropriety of the remand order, foreclosing this Court's rare application of summary reversal.

B. Applicants Fail to Establish Irreparable Harm

For the stay relief sought, Applicants must additionally meet the "heavy burden" of showing that they will suffer irreparable injury in the absence of that relief. *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers). The irreparable harm analysis involves "balancing the injury to one side against the losses that might be suffered by the other." *Id.* at 1312 (citations and quotation marks omitted). "Where the lower court has already performed this task in ruling on a stay application, its decision is entitled to weight and should not lightly be disturbed." *Id.* Applicants' claims of harm here fall well short of what is required, and their application should be denied on that basis alone.

To begin, Applicants' own lack of urgency demonstrates that there is no harm. After initially failing to respond to EPA's original motion for remand, and then moving to strike portions of Plaintiffs-Respondents' briefs, Applicants delayed the briefing schedule and hearing on EPA's motion. Moreover, Applicants waited a month after the remand order issued to appeal and seek a stay from the district court. Then, after the court of appeals denied their request for a stay, they waited another month to seek a stay from this Court. The district court's vacatur has now been in effect for more than five months—almost half as long as the thirteen months the 2020 Rule was in effect.

Moreover, while asserting the difficulty of securing a decision from the court of appeals prior to the potential issuance of a revised rule next year, Applicants have made no attempt to accelerate the briefing schedule.

Next, Applicants fail to identify any concrete harm at all, much less irreparable harm. Despite the passage of more than five months since the remand order, Applicants fail to identify a single permit denied, a single project delayed, or a single alleged Section 401 "abuse." Instead, Applicants make distorted references to a handful of prior Section 401 certification decisions—out of thousands of certifications issued annually—that they allege resulted in harm to their members. Stay Appl. 26-27. Those past certification decisions—which, as explained above, focused squarely on water quality concerns and were subject to judicial review—cannot overcome Applicants' failure to show current or future harm here. Applicants provide only sheer speculation as to Section 401 abuses they allege will occur in the roughly 12 months between now and when a final replacement rule is expected.

Applicant States, moreover, are especially ill-suited to claim harm because the remand order does nothing but remove the uncertainty created by the 2020 Rule and restore their authority to regulate their own water quality in the way that Congress always intended.

Applicants thus fail to make the showing required for a stay pending appeal, which, like a preliminary injunction, is an "extraordinary" remedy. *See Williams*, 442 U.S. at 1316. As such, irreparable harm must be "*likely*," not just a "possibility . . . of some remote future injury." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22

(2008) (emphasis in original); *see id.* ("[i]ssuing a preliminary injunction based on only a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy"). Vague allegations of future actions by unnamed states and tribes that harm unnamed parties in undefined ways do not constitute a "likely" injury; they are the very definition of speculative harm.

Additionally, Applicants' ability to challenge individual certification decisions in state or federal court protects against certification decisions that exceed state or tribal authority. Even if Applicants' purported fears materialized, judicial review would allow them to challenge an unfavorable decision. There is no reason to preemptively invoke this Court's jurisdiction, much less its emergency power to issue a stay, when ordinary judicial review would protect Applicants' interests.

Applicants' complaints of "whipsawing" and "regulatory uncertainty" also fail to rise to the level of the concrete, well-articulated harms necessary to justify a stay. Their claim that general uncertainty will deter large projects fails on its face: the status quo to which the remand order returned is the same system that successfully governed Section 401 for fifty years and under which thousands of massive infrastructure projects were completed. That system is, in fact, much more familiar to regulated entities and certifying authorities than is the 2020 Rule. Resp. App. 153a. Therefore, it is no surprise that Applicants fail to identify a single project that has been cancelled, significantly delayed, or otherwise jeopardized in any way since the remand order issued.

Any harms caused by supposed whipsawing would in fact be worsened by the issuance of a stay. It was EPA's promulgation of the 2020 Rule that broke with prior precedent. In fact, at least one of Applicants' own regulatory agencies acknowledged the dysfunction and confusion caused by the 2020 Rule. *See, e.g.*, Letter from Toby Baker, the Texas Comm'n on Env't Quality, to Lauren Kasparek, EPA (Aug. 2, 2021).[2]

A stay of the remand order pending appeal would only exacerbate any "whipsawing" and resulting "regulatory uncertainty" following the 2020 Rule's disruption of the prior fifty years of practice. A stay at this point would mean a shift back to the uncertainty of the 2020 Rule, followed mere months later by *another* shift when EPA issues its final revised Section 401 rule, anticipated to occur in 2023. Any harms from regulatory uncertainty at this point would come most acutely from granting Applicants' own Application.

C. Equitable Considerations Favor Denying a Stay

In close cases, "the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. In doing so, "[a] lower court judgment, entered by a tribunal that was closer to the facts than a single Justice, is entitled to a presumption of validity." *Williams*, 442 U.S. at 1311. Plaintiffs-Respondents disagree that this is a close case. But, to the extent this Court does balance the equities, those scales tip strongly in favor of denying a stay for reasons already largely addressed.

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[2] https://www.regulations.gov/comment/EPA-HQ-OW-2021-0302-0079 (last visited on March 24, 2022).

As noted, Applicants present no concrete harm to weigh against Plaintiffs-Respondents' numerous and specific harms. Despite being on their third attempt to obtain a stay over the course of five months, Applicants have yet to identify a single impact to one of their members aside from a desire to operate in their preferred regulatory environment for the next several months. Moreover, the remand order dictates no outcome for EPA's efforts to revise the 2020 Rule and no limits on Applicants' participation in that process. Applicants are, therefore, free to continue to urge EPA to adopt the same rule Applicants say they "convinced" the agency to adopt in 2020. Stay Appl. 25.

By contrast, Plaintiffs-Respondents carefully and in detail set out the specific harms likely to transpire under the 2020 Rule. In support of their opposition to remand without vacatur, states across the country identified the significant implementation challenges, delays, and regulatory uncertainty the 2020 Rule caused. Stay App. 299-423. And, as the district court detailed, Plaintiffs-Respondents established "significant environmental harms" likely to transpire under the 2020 Rule, including as one example Washington State's inability to apply water quality protections for hydropower licenses with a 30- to 50-year lifespan and critical to salmon and orca populations in the Pacific Northwest. Stay App. 567. When weighed against those and countless other harms identified by Plaintiffs-Respondents below, Applicants' speculative claims of unknown harms pale in comparison. The equities strongly favor denying a stay.

CONCLUSION

This Court should deny Applicants' request to stay the remand order, as well as their request to construe the Application as a petition for a writ of certiorari, grant certiorari before judgment, and summarily reverse.

RESPECTFULLY SUBMITTED.

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